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No. 91-1589

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1991

GEORGE SWAMP, JOHN HENDRICK, and LABOR-FARM PARTY/PARTIDO LABORISTA-AGRARIO,

*Petitioners,*

v.

KEVIN KENNEDY, individually and as Executive Director, Wisconsin State Board of Elections, PETER R. DOHR and THOMAS P. GODAR, MARK E. SOSTARICH, ROBERT L. TURNER, JOHN NIEBLER, DAVID W. OPITZ, BRENT SMITH and KIT SORENSON, individually, and as Members, Wisconsin State Board of Elections,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Are Wisconsin's statutes which restrict a candidate from simultaneously appearing on the ballot as the candidate of more than one political party or as the candidate of a party and as an independent candidate unconstitutional under the First and Fourteenth Amendments?

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## RESPONDENTS' BRIEF IN OPPOSITION

The respondents, the State of Wisconsin Elections Board and its Executive Director, respectfully request this Court to deny the petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Seventh Circuit. The court's opinion is reproduced in the appendix to the petition (App. A at 1a).

The petitioners' Statement of the Case is accurate.

## REASONS FOR DENYING THE WRIT

### I. THE CHALLENGED STATUTES RESTRICT A CANDIDATE TO ONE PARTY AND ONE OFFICE ON A BALLOT. ANY EFFECT ON A PARTY'S ASSOCIATIONAL RIGHTS IS INCIDENTAL AND MINIMAL.

The petitioners persist in mis-characterizing the Wisconsin law. Sections 8.03(1) and 8.15(7), Wis. Stats., impose restrictions on candidates. Section 8.15(7), Wis. Stats., prohibits a candidate from running in more than one party primary at the same time or from running as an independent candidate and the candidate of a recognized political party at the same election. Section 8.03, Wis. Stats., provides that if a person is nominated to the same office by more than one party or nominated for more than one office, the candidate must choose which party or which office to accept. The petitioners' statement that "Wisconsin's MPN-ban tells Labor Farm whom it can nominate" (Petition at 9) is disingenuous at best. The laws do not prohibit any party from choosing a candidate; they simply say that if a candidate has already chosen another slot on the ballot, he or she cannot appear on the ballot again. That is true whether the candidate wishes to appear as the candidate of two or more parties or whether the candidate wishes to run as both a party candidate and an independent candidate.

Douglas La Follette filed his own nomination papers as a candidate for Secretary of State in the Democratic Primary (R. 6, Exhibit C; R. 19:1, para. 2). He could have chosen to run in the Labor-Farm Primary or the Republican Primary. The law honors the candidate's selection of a party and only prohibits a candidate's

"access" to more than one position on the ballot. The law does not prohibit a party from soliciting another party's candidate to run in the first party's primary. In Wisconsin, the candidate picks the party; the party does not pick the candidate. The Wisconsin law simply says that if the Labor-Farm Party cannot convince a candidate to run in its column, it cannot claim that candidate as its candidate. The choice, however, does not rest with the Democratic Party, the Republican Party or the Labor-Farm Party. The choice rests with the candidate. The law is only slightly different from the usual laws regulating voting and voters' party affiliation, *e.g.*, if a voter chooses to vote in the Democratic primary he or she will not be able to vote, in that election, in another party's primary. State law restricts the candidate and the voter to one choice. It does not at all restrict the exercise of that choice.

The right to vote is fundamental. *Yick Wo. v. Hopkins*, 118 U.S. 356, 370 (1886); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). There is no parallel right to be a candidate. *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972). This Court has recognized that "voters can assert their preferences only through candidates or parties or both." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). Despite this recognition the Court consistently has held that the status of candidacy does not invoke a rigorous standard of review. *Bullock*, 405 U.S at 143.

The Wisconsin laws, on their face and as applied, restrict a candidate's choice. That is bound to have an effect on any party the candidate does not choose. As noted earlier, however, that is no different than the effect on candidates and parties of state laws restricting voters to one vote or one party.

In *Storer v. Brown*, 415 U.S. 724 (1974), this Court considered California statutes which required an independent candidate to: (1) Be unaffiliated with a qualified political party for a period of one year prior to the

next primary election; (2) File nominating petitions signed by qualified voters not less than five percent nor greater than six percent of the votes cast in the last general election; (3) Obtain all signatures during a twenty-four-day period following the primary election; and (4) Use signatures from only those who had not voted in the primary election. *Storer*, 415 U.S at 726-27. The Court upheld that portion of the statute which covered candidate affiliation but remanded the case for a closer look at the other provisions. The statutory scheme upheld in *Storer* included a ban on multiple candidate nominations. *Storer*, 415 U.S. at 734, 749. The Court noted that California forbid the cross-filing practices "after long experience with permitting candidates to run in the primaries of more than one party." *Id.*

Earlier, the Court upheld without opinion an Ohio statute which barred the primary candidacy of anyone who had even voted in a different party's primary in the last four years. *Lippitt v. Cipollone*, 404 U.S. 1032 (1972), *aff'g mem.*, 337 F. Supp. 1405 (N.D. Ohio 1971).

The Court relied on its decision in *Storer* in both *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) and *Eu v. San Francisco Cty. Democratic Cent. Com.*, 489 U.S. 214 (1989), the two cases upon which the petitioners attempt to build their case. In *Tashjian*, the Court noted that in *Storer*, "[w]e upheld a California statute which denied access to the ballot to any independent candidate who had voted in a party primary or been registered as a member of a political party within one year prior to the immediately preceding primary election." *Tashjian*, 479 U.S. at 223. The Court was hardly suggesting that it was ready to decide *Storer* differently; on the contrary, it was reaffirming the validity of that decision.

The statute challenged in *Tashjian* prohibited independents from voting in the Republican primary even

though the Republican Party wished to allow those independent voters to participate in their nominating process. The law, therefore, directly infringed on a voter's right to associate with the political party of his or her choice and defeated the party's attempt to broaden its base of public participation. The Court in *Tashjian* did not suggest that voters should be allowed to vote in the primaries of two parties; the Court merely held that the state could not erect a barrier to a voter's choice of party.

Wisconsin law imposes no such barrier to a candidate's choice of party. That choice is solely the candidate's choice. The challenged statutes simply limit a candidate to one choice, one "vote." The associational right at stake here, therefore, is the right of the Labor-Farm Party to associate on a ballot with a candidate who has first chosen to associate with another party on that ballot.

If the Constitution requires that petitioners be allowed to have a candidate on their ballot who has already decided to be on another party's ballot, the Equal Protection Clause of that same Constitution would require the same conclusion for other parties which were similarly situated. Therefore, if Wisconsin or any other state had three minor parties as well as the two major parties on a ballot, at least all of the minor parties, and possibly the major parties, would have the constitutional right to have the same candidate run for the same office. Wisconsin's law does not "limit the field of candidates from which voters might choose." *Anderson*, 460 U.S. at 786, *quoting*, *Bullock*, 405 U.S. at 143; it assures that the field of candidates will not be limited to one very popular candidate purporting to represent all political parties.

The petitioners propose to strengthen their political party by limiting the voters' choice of candidates. The Constitution does not require the state to adopt that view of desirable electoral policy. The Wisconsin laws restrict a party's choice of a candidate only to the extent that that

party is unable to convince the candidate to be its candidate. The ability to convince candidates to be a party's candidate and the concomitant ability to convince voters to vote for a party's candidate are the essence of politics. The Wisconsin laws have not stopped Wisconsin voters from electing third-party Governors and Senators. Indeed, the Progressive Party became a force in Wisconsin politics forty years after the statute's genesis in 1897.[1]

## II. THE STATE'S INTERESTS ARE SUBSTANTIAL.

The cases upon which the petitioners rest their argument all involve a state's limiting a party's access to the ballot, *Anderson*, 460 U.S 780; *Norman v. Reed*, 112 S. Ct. 698 (1992); *Eu*, 489 U.S. 214, or a state limitation on who can vote in a party's primary. *Tashjian*, 479 U.S. 208. If the state law thwarts a party's access to the ballot the state must demonstrate a corresponding interest sufficiently weighty to justify the limitation. Any "severe" restriction on a new party's access to the ballot must be narrowly drawn to advance a state interest of compelling importance. *Norman*, 112 S. Ct. at 705.

As noted above, Wisconsin's laws do not restrict the party's access to the ballot. Wisconsin's laws are anything but restrictive. Wisconsin requires only 2,000 signatures

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[1]Philip F. La Follette was elected Governor as a Progressive in 1934. Orlando S. Loomis was elected Governor as a Progressive in 1942, having been elected Attorney General as a Progressive in 1936. Robert M. La Follette was elected to the United States Senate as a Progressive in 1934, and re-elected as a Progressive in 1940. The Progressives also elected a secretary of state (Theodore Damman, 1934), a lieutenant governor (Henry A. Gunderson, 1936) and a state treasurer (Solomon Levitan, 1936).

to put someone on the ballot in a primary for statewide office, sec. 8.15(6), Wis. Stats.; allows registration at the polls, sec. 6.55, Wis. Stats.; and does not require any party registration at all. Every recognized political party listed in the last gubernatorial election whose candidate for any statewide office received at least one percent of the total votes cast for that office has a separate primary ballot. Sec. 5.62(1)(b), Wis. Stats. The Court must look at the "totality" of the election laws when assessing the impact of one of those laws. *Williams v. Rhodes*, 393 U.S. 23, 34 (1968).

The challenged statutes regulate not only multiple party nominations; they also prohibit someone who is running as an independent candidate from filing nomination papers as the candidate of a recognized political party; prohibit someone who is running as the candidate of a recognized political party from filing as an independent candidate, sec. 8.15(7), Wis. Stats.; and also prohibit someone from running for more than one office in the same election. Sec. 8.03(1), Wis. Stats. The Wisconsin statutes further the same state interests as the statutes upheld in *Storer*. In fact, Wisconsin's laws are less restrictive than the law upheld in *Storer*; they do not require a candidate to forsake party affiliation and do allow a candidate to change parties at any time. The declaration of candidacy, which can be filed even before nomination papers are filed, simply states that the signer is a candidate for a named office, that he or she meets, or will at the time he or she assumes office, applicable age, citizenship, residency or voting qualification requirements and that he or she will otherwise qualify for office if nominated and elected. Sec. 8.21, Wis. Stats.

Unlike the statutes in *Storer*, *Rosario v. Rockefeller*, 410 U.S. 752 (1973) and *Jenness v. Fortson*, 403 U.S. 431 (1971), Wisconsin's laws do not limit disaffiliation, do not preclude independent candidacies and do not preclude party switching. The only restriction is that a candidate

cannot be on the ballot more than once. Without the challenged laws any party could borrow a major party's candidate in an attempt to stay on the ballot, thereby defeating the state's "admittedly vital interests" including the "preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion." *American Party of Texas v. White*, 415 U.S. 767, 782, n. 14 (1974).

Wisconsin's laws, like California's, seek "to have contending forces within the party employ the primary campaign and primary election to finally settle their differences." *Storer*, 415 U.S. at 735. The ballot, therefore, presents the voters "with understandable choices and the winner in the general election with sufficient support to govern effectively." *Id.* The Wisconsin law, like the laws upheld in *Storer*, further the state's compelling interest in the stability of its political system.

Wisconsin could adopt more onerous restrictions and still be well within constitutional parameters. Wisconsin allows party switching, including instantaneous party switching. It has no party registration requirement. It has no disaffiliation requirement. The Wisconsin statute accomplishes Wisconsin's compelling interests less restrictively than laws which impose party registration requirements, party affiliation requirements, or party disaffiliation bars to candidacy. All of those restrictions have been upheld by this Court. Wisconsin's law falls well within the constitutional parameters set by this Court.

The petitioners suggest that Wisconsin could avoid some of the evils it perceives in allowing a candidate to appear on the ballot more than once by less restrictive means (Petition at 12–13). Removing the ban against multiple candidacies and substituting the petitioners' proposed cures, however, would not accomplish all of the state's legitimate goals. For example, although involuntary nominations by extremist parties could be resolved by the

simple expedient of requiring candidate consent, candidate consent alone is not enough. A candidate running in two parties' primaries should have the consent of both parties. The state could hardly force a party to give its consent, however. *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107 (1981); *Eu*, 489 U.S. 214. Presumably, if a candidate had a right to be on the ballot twice, he or she would also have the right to be on the ballot more than twice, that is, a candidate could be many parties' candidate. Wisconsin does not want to limit the field of candidates from which voters might choose. *Anderson*, 460 U.S. at 786; *Bullock*, 405 U.S. 134. It has a compelling interest in expanding the number of candidates on the ballot and a corresponding compelling interest in not restricting the field of candidates simply to foster a minor party's chance of electoral success.

## III. THE LOWER COURTS CORRECTLY APPLIED WELL-SETTLED LAW. THE CASE IS NOT WORTHY OF REVIEW.

Restricting a candidate to one position on the ballot is hardly unusual and has never before been challenged as very restrictive. That is perhaps so because other, more restrictive statutes have been upheld by this Court. Wisconsin has an historical distrust of political parties; it was the first state to require that candidates be chosen in binding primaries. That distrust of political party power is reflected in the state's allowing candidates to choose the parties instead of the parties choosing the candidates. The court of appeals correctly concluded that the cases concerning a state's interference with a party's internal affairs are simply inapplicable. According to the petitioners, eight states either permit or do not ban multiple nominations by political parties (Petition at 3, n. 3). The other forty-two states, Wisconsin included, choose

different electoral systems. The First and Fourteenth Amendments certainly do not require that those forty-two states adopt an electoral system more to the petitioners liking.

The court of appeals correctly applied long-standing precedent and recent precedent. There is nothing in the case that would warrant the granting of the writ.

## CONCLUSION

For these reasons, this Court should deny the writ.

Respectfully submitted,

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